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320-588—68——1

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 432

JULIAN PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–7) has not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1968. The petition for a writ of certiorari was filed on August 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied the right to a speedy trial.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Northern District of Indiana of armed robbery of a federally insured bank, in violation of 18 U.S.C. 2113(d), and on September 13, 1967, was sentenced to 20 years' imprisonment (Pet. 3). The court of appeals affirmed (Pet. App. 1–7).

1. The robbery was committed on November 20, 1961 (A. 1).[1] In June 1964, co-defendant Paramo, while confined in a tuberculosis hospital, made a confession implicating petitioner and co-defendant Zurita. Paramo was arrested upon his release from the hospital in April 1965 (Pet. App. 4), and a complaint was filed with a United States Commissioner charging the three defendants with the robbery.[2] An indictment was returned on June 23, 1965 (A. 1; Pet. 3; Pet. App. 1). At that time petitioner was confined in the Arkansas State Penitentiary, to which he had been committed in October 1963 to serve a six-year sentence for armed robbery (Pet. App. 10, 15). On about June 30, 1965, petitioner was served in the Arkansas prison with a copy of the indictment, and a federal detainer was lodged against him with the prison officials (Pet. App. 10, 13, 17).

[1] "A." refers to the appendix to petitioner's brief in the court of appeals, a copy of which is on file with the Clerk of this Court.

[2] The opinion of the court of appeals and the petition refer to the filing of an "information" in April 1965 (Pet. App. 1; Pet. 3). We are advised by the United States Attorney that the document to which the court and petitioner apparently refer is the complaint filed with a United States Commissioner on April 20, 1965.

In early November 1965, the Assistant United States Attorney in charge of the prosecution twice sought to secure the cooperation of the Arkansas prison officials in obtaining temporary custody of petitioner so that he could stand trial with Zurita [3] in the Northern District of Indiana. On both occasions, the Head Warden, Captain A. D. Nisler, stated that petitioner would not be made available for this purpose prior to his discharge from prison upon completion of his sentence, and that the earliest release date would be December 30, 1966. The warden further advised the prosecutor that, if served with a writ of habeas corpus *ad prosequendum* issued by the district court, the Arkansas authorities would not comply with it (Pet. App. 14, 16). When these efforts proved unavailing, the prosecutor proceeded against co-defendant Zurita alone (Paramo having previously pleaded guilty) at a trial held in December 1965 (Pet. 3; Pet. App. 14).

On March 10, 1967, petitioner completed service of his Arkansas sentence,[4] and he was removed by federal authorities to the Northern District of Indiana to answer to the indictment (Pet. App. 2). Prior to trial, he moved to dismiss the indictment on the ground that his right to a speedy trial had been violated (Pet. App. 10–11). The government filed a

[3] Paramo pleaded guilty and testified as a government witness at the trials of both Zurita and petitioner (Pet. 3).

[4] Petitioner had served approximately 3½ years of the six-year sentence. The difference between the time served and the full term was apparently attributable to earned good-time allowances (Pet. App. 15, 17).

memorandum in opposition to the motion and a supporting affidavit reciting the foregoing efforts to secure petitioner's custody for trial (Pet. App. 12–14). At a hearing on the motion, petitioner acknowledged that he had at no time requested that he be tried promptly on the indictment while he was confined in the Arkansas penitentiary (Pet. App. 17). He stated that he had not been aware of his right to a speedy trial and that no one had advised him of the right (Pet. App. 16). Although he had discussed the pending indictment with the Arkansas prison authorities, he stated that he had not mentioned his desire for a speedy trial to them (Pet. App. 16–17, 18). He testified that in a discussion with the warden concerning the possibility of his pleading guilty to the indictment, he advised the warden that he did not wish to discuss the matter with anyone other than a lawyer of his own choosing (Pet. App. 16–17).

The motion to dismiss was denied (A. 13), and petitioner was brought to trial in July 1967 (Pet. 3).

2. Petitioner does not challenge the sufficiency of the evidence to sustain the conviction. The government's evidence at trial showed that petitioner, Zurita, and Paramo obtained entry to the home of the bank manager by pretending to be deputy sheriffs, that they held the manager and his wife captive all night, and that in the morning petitioner and Zurita forced the manager to open the bank's vault and night depository. Paramo testified that he remained at the home with the bank manager's wife for about 15 minutes after the others had departed (Pet. App. 2).

Petitioner's defense was that he was at work on the day of the robbery, Monday, November 20, 1961. His wife testified that he was at home on the night of Sunday, November 19, because he had never stayed away all night at any time since they were married. She said he always worked on Mondays because Tuesday was his day off in 1961. Two fellow employees testified that they thought that Tuesday was petitioner's day off in 1961, but neither could remember positively because of the lapse of time. A work record showed that petitioner had worked 40 hours during a period which included Monday, November 20, but it did not indicate which days he had worked (Pet. App. 2–3). Petitioner did not testify in his own behalf.

In rebuttal, F.B.I. Agent Dumaine testified to a contemporary record of a statement made in 1963 by one of the employees who appeared as a defense witness that petitioner's regular day off was Monday. At trial, the witness did not recall making that statement. A partner in the concern, Mitchell Obuchowski, subsequently told Agent Dumaine that petitioner's day off was Tuesday, but then returned after a conversation with Edward Rzeznick, the other employee who testified ~~for the defense~~, and told the agent it was Monday (Pet. App. 3).

ARGUMENT

Petitioner does not contend that the government was responsible for the three years and five months delay between the commission of the offense (November 20, 1961) and the filing of the complaint with the

commissioner in April 1965.[5] His sole objection relates to the substantially lesser period of two years and three months between the filing of the complaint and the trial in July 1967, and particularly to the 19-month period between Zurita's trial and his own conviction. (Pet. 6, 8). The court of appeals correctly held that the delay complained of was likewise not the fault of the government; that any objection was waived by petitioner's failure to request a prompt trial; and that in all events, there was no prejudice.

1. The record shows that the government made every reasonable effort to secure the presence of petitioner for a joint trial with Zurita, but was prevented from doing so by the refusal of the Head Warden of the Arkansas State Penitentiary to make petitioner available to the federal authorities for that purpose. The essence of petitioner's contention is that the government should have applied to the district court in Indiana for a writ of habeas corpus *ad prosequendum*, directing the Arkansas warden to surrender temporary custody of petitioner so that he could be brought to trial on the federal indictment. But, as the court below pointed out, the efficacy of a federal writ

[5] As the court of appeals observed, while Paramo's confession, in June 1964, was a turning point in the F.B.I.'s investigation of the crime, it did not terminate the investigation (Pet. App. 4). In denying petitioner's motion to dismiss the indictment, the district court, referring to its own recollection of the Zurita trial (held in December 1965), commented that the time lapse between the offense and the return of the indictment could not be charged to the government because there had been a "lack of sufficient identity and evidence" to warrant earlier indictment (A. 13). Petitioner does not challenge the court's statement.

of habeas corpus *ad prosequendum* issued with respect to a prisoner in State custody requires the consent of the responsible State authorities. *Strand* v. *Schmittroth*, 251 F. 2d 590, 599 (C.A. 9), certiorari dismissed, 355 U.S. 886; *United States ex rel. Moses* v. *Kipp*, 232 F. 2d 147, 150 (C.A. 7); *Stamphill* v. *Johnston*, 136 F. 2d 291, 292 (C.A. 9), certiorari denied, 320 U.S. 766. Compare *Ponzi* v. *Fessenden*, 258 U.S. 254, 261–263 (transfer of federal prisoner to State authorities for purposes of prosecution held authorized *if consented to by the Attorney General*); *Carbo* v. *United States*, 364 U.S. 611, 621 n. 20 (writ *ad prosequendum* directed to New York City prison official who voluntarily honored it sustained as against claim that the federal writ did not properly run beyond the territorial limits of the issuing court; "In view of the cooperation extended by the New York authorities in honoring the writ, it is unnecessary to decide what would be the effect of a similar writ absent such cooperation"). See also *Hebert* v. *Louisiana*, 272 U.S. 312, 315–316.

It is evident, therefore, that the Arkansas authorities could successfully have resisted a writ *ad prosequendum* had the prosecutor sought and obtained one. In view of the warden's expressed intention not to comply with such a writ, and the fact (not disputed by petitioner, see Pet. 6) that the relevant Arkansas statutes are, as the court below observed, merely "permissive in nature and not obligatory" (Pet. App. 5), the prosecutor reasonably decided that further

steps to secure petitioner's presence for trial before the completion of his State sentence would be bootless.[6]

2. Petitioner's failure to demand an immediate trial after being served with a copy of the federal indictment precluded his later objection based on an alleged denial of his Sixth Amendment right. *United States* v. *Maxwell,* 383 F. 2d 437, 441 (C.A. 2), certiorari denied, 389 U.S. 1043 (*sub nom. Aiken* v. *United States*) and 1057. The fact that petitioner was in custody when he learned of the indictment and was not, according to his testimony, advised at that time of his right to demand a speedy trial may be taken into account in determining whether petitioner intelligently waived his right to be brought to trial as promptly as circumstances would permit (cf. *United States* v. *Chase,* 135 F. Supp. 230 (N.D. Ill.). See also *United States* v. *Lustman,* 258 F. 2d 475, 478 (C.A. 2), certiorari denied, 358 U.S. 880; *United States* v. *Hill,* 310 F. 2d 601, 603 (C.A. 4)).[7] But these factors are of

[6] Petitioner's reliance on *People* v. *Winfrey,* 20 N.Y.2d 138 (1967) (Pet. 6–7), is misplaced. The court held that a delay of more than five years in bringing the accused to trial while he was incarcerated in Alabama was unreasonable, and ordered the charges dismissed. The critical distinction between *Winfrey* and the present case, however, is the fact that the New York authorities made no effort whatever to return the accused to New York for seasonable trial. The court observed that if the New York authorities had asked the Alabama officials to surrender the accused for purposes of prosecution, the denial of such a request "would, of course, [have been] an excuse" (20 N.Y. 2d at 144).

[7] *Pitts* v. *North Carolina,* 395 F. 2d 182 (C.A. 4), cited by petitioner (Pet. 11–12), involved a prisoner-accused against whom the charge in issue had been pending for seven years without his knowledge (395 F. 2d at 187) and is thus clearly distinguishable from this case.

minimal significance in this case in view of petitioner's apparent sophistication in criminal procedure (see Pet. App. 16–17).

3. Finally, there is no more than a speculative basis for a claim of prejudice arising from the fact that petitioner's trial was held 19 months after the earliest practicable date on which it could have been held—December 1965, when Zurita was tried—if the Arkansas authorities had cooperated in making petitioner available. The only possible prejudice which can fairly be inferred relates to the testimony of petitioner's two fellow employees, ~~who were offered as alibi witnesses~~. They testified that they thought that petitioner's day off from his job in 1961 was Tuesday, from which the jury was asked to infer that petitioner was at work on the day of the robbery, a Monday. Whatever value that testimony may have had was diminished by the fact that the witnesses could not testify positively on the point because of the lapse of time (p. 5, *supra*). But any supposition that these witnesses might have had clearer recollections in December 1965 than they had in July 1967 of petitioner's work schedule for November 1961 would be, as the court of appeals noted, "mere conjecture" (Pet. App. 3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
PHILIP R. MONAHAN,
Attorney.

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